Filed 5/24/10 Igbene v. Jackson Federal Bank CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AKALI IGBENE, Plaintiff and Appellant, v. JACKSON FEDERAL BANK et al., Defendants and Respondents.	A122757 (Alameda County Super. Ct. No. RG07354323)

Akali Igbene defaulted on a real estate loan made to him by Jackson Federal Bank. While foreclosure proceedings were pending, Igbene sued the bank, alleging that certain terms of the loan—contained in the deed of trust and promissory note he had signed—were inconsistent with the original loan commitment letter issued to him by the bank. He now appeals from a judgment dismissing his suit, entered after the bank's demurrer to Igbene's second amended complaint was sustained without leave to amend. We affirm the judgment.

I. BACKGROUND

In his capacity as the trustee of a revocable trust, Igbene sued Jackson Federal Bank (JFB), Union Bank of California, N.A., and Union Bank of California, N.A. as successor in interest to Jackson Federal Bank (collectively, the Bank) for breach of contract, fraud, and declaratory and injunctive relief. The Bank demurred to the original complaint filed November 1, 2007. Before the hearing on the demurrer, Igbene filed a first amended complaint to which the Bank also demurred. The Bank's demurrer to the first amended complaint was sustained with leave to amend in April 2008. The Bank's

demurrer to Igbene's second amended complaint (SAC) was thereafter sustained without leave to amend in June 2008. This timely appeal from the ensuing judgment of dismissal followed.

A. *Allegations of SAC*

The SAC alleges that on or about August 25, 2004, JFB executed a loan commitment letter in which it agreed to provide a real estate finance loan to Igbene in the amount of $1,190,000. The SAC further alleges that the Bank acquired JFB in 2004 and assumed all of its debts and liabilities.

The loan commitment letter is attached as an exhibit to the SAC.[1] It includes the following provisions: "Pursuant to your request *and subject to the terms and conditions set forth in this commitment*, Jackson Federal Bank (JFB) is pleased to offer, and will reserve from its assets a loan for you, *subject to the following terms and conditions*: [¶] . . . [¶] *The undersigned borrower*(s) . . . hereby acknowledge, *by the signing of this document*, that they have read and have understood [all of its terms] and *unconditionally accept and approve all items contained herein*. . . . [¶] . . . [¶] Section III. Funding Conditions. [¶] A. Execution (including acknowledgment and notarization) of all legal documents. This includes but is not limited to, promissory note, deed of trust, assignment of rents, ... [¶] . . . [¶] E. Any other documentation deemed necessary by JFB or its counsel. *All documents necessary to create and perfect JFB's collateral security interest shall be in a form and content which is satisfactory to JFB*. [¶] . . . [¶] Section V. General Terms and Conditions. [¶] . . . [¶] D. Borrower's signature on any instrument(s) or instructions indicate unconditional approval of same." (Italics added.) The letter stated: "The commitment shall expire September 24, 2004, at 5:00 P.M."

The SAC did not allege that Igbene signed the letter but instead alleged that Igbene "accepted [the Bank's] offer to issue the loan on the conditions spelled out in the

[1] The copy attached to the SAC does not bear Igbene's signature accepting its terms. However, Igbene's counsel represented to the trial court that he had a copy of the letter signed by Igbene. For purposes of ruling on the demurrer, the court assumed Igbene signed the letter.

contract, by performing the conditions called for in the contract, including, without limitation, the payment of a non-refundable commitment fee in the sum of $6,500.00 and taking a loan from [the Bank] in the sum of $1,190,000." [2] The SAC alleged in particular that Igbene executed a promissory note payable to the Bank in the amount of $1,190,000 and, as security for payment of the note, executed a deed of trust on real property located at 315 Washington Street in Oakland, California. The promissory note and deed of trust were also attached as exhibits to the SAC.

Section 5(b) of the promissory note states: "If and so long as any default exists under this Note or any of the Loan Documents, the interest rate on this Note, and on any judgment obtained for the collection of this Note, shall be increased from the date of such default to a rate (the 'Default Rate') equal to five (5) percentage points per annum higher than and varying periodically with the Variable Note Rate hereunder as then applicable."

Section 8(k) of the note provides that a further encumbrance of the Washington Street Property is a default of its terms.

Section 10 of the note states: "**Prohibition on Transfers, Assignments and Further Encumbrances.** [Borrower] acknowledges and agrees that it has read and understands the prohibition on transfers, assignments and further encumbrances set forth with particularity in Paragraphs 24 and 25 of the Deed of Trust."

Paragraph 21 of the deed of trust granted the Bank a security interest in all articles of personal property attached to the Washington Street property.

Paragraph 25 of the deed of trust executed by Igbene, entitled "Further Encumbrances," states in part as follows: "Therefore, as a principal inducement to [JFB] to make this loan and with the knowledge that [JFB] will materially rely upon this paragraph in so doing [Borrower] acknowledges that it shall be in material default hereunder and under the Note if [Borrower] encumbers the Property with any lien other than the lien of this Deed of Trust."

[2] The Bank disputes that the letter constituted a contract. This issue is addressed *post*.

The SAC alleges the Bank sent Igbene and recorded a default notice asserting Igbene had breached the deed of trust by (1) taking a second trust deed against the property without the Bank's consent, and (2) falling behind in his monthly payments.

Igbene's first cause of action for breach of contract added the following material allegations: (1) the loan commitment letter constituted a contract; (2) Igbene had equity of $640,500 in the Washington Street property; (3) the Bank breached the contract by presenting Igbene with a deed of trust for execution that contained conditions, including a restriction on further encumbrances, and a provision creating a security interest in personal property attached to the Washington Street property, that were not among the terms and conditions of the loan commitment letter; and (4) the Bank further breached the contract by increasing the default interest rate on the loan to 14 percent (five percentage points higher than the variable rate then in effect) in violation of a provision of the loan commitment letter specifying that the floor and ceiling interest rates on the variable rate loan would be 5 and 11 percent, respectively.

Igbene's second cause of action for fraud based on deceit alleged (1) the Bank represented to Igbene in the loan commitment letter that it would issue a loan subject to the conditions spelled out in it; (2) at the time of making this representation and prior to Igbene's execution of the letter, the Bank did not disclose to Igbene that his rights to further encumber the property were going to be curtailed by the deed of trust; (3) Igbene reasonably relied on the Bank's representations; and (4) Igbene was damaged by his reliance on the Bank's false representation because the Bank recorded a default notice based on Igbene's purported violation of the restriction against further encumbrances.

In his third cause of action for fraud based on nondisclosure, Igbene alleged the Bank had a duty to disclose its intent to restrict Igbene's right to further encumber the property because it alone had knowledge of that fact and knew that it was not reasonably discoverable by Igbene.

Igbene's fourth cause of action for declaratory relief alleged that an actual controversy had arisen over the terms of his loan commitment contract with the Bank in that the Bank contended Igbene had breached the deed of trust by failing to make

payments of principal due on or after June 2007 and encumbering the property by taking a second trust deed, and Igbene contended he was not in breach because the restriction on encumbrances was at variance with the contract.[3]

B. ***Trial Court's Rulings***

The trial court found as a matter of law that the terms contained in the deed of trust to which Igbene objected—the prohibition on further encumbrances and the provision allowing the Bank to increase the interest rate upon default—did not constitute a breach of the loan commitment letter because the letter expressly made the loan conditional on "[e]xecution . . . of all legal documents," including the "promissory note [and] deed of trust," and "[a]ny other documentation deemed necessary by [the Bank] or its counsel." The court further pointed out that the letter stated, "Borrower's signature on any instrument(s) or instruction indicate[s] unconditional approval of same." The court concluded, "Having admittedly signed, and thereby approved of, the terms and conditions in the promissory note and deed of trust that were subsequently offered to [him, Igbene] entered new agreements that included such terms," and therefore his "breach of contract claim is deficient as a matter of law, and cannot be remedied by further amendment."

The court also found as a matter of law that the inclusion in the deed of trust of terms not expressly set forth in the loan commitment letter was not misleading for purposes of Igbene's second cause of action for fraudulent deceit because the letter made the execution of all legal documents, including a promissory note and deed of trust, one of the express conditions for the loan. Further, by signing the deed of trust, Igbene approved of the additional terms contained in it. Igbene's third cause of action for fraud based on nondisclosure was also barred as matter of law because he did not allege the Bank had a fiduciary relationship with him and no such relationship is implied by law between a bank and its borrower. That the deed of trust contained a term restricting

[3] We will not separately address Igbene's fifth cause of action for injunctive relief. It alleged no legal theory independent of the first four causes of action, but merely requested a different form of relief for those alleged wrongs. (See *MaJor v. Miraverde Homeowners Assn.* (1992) 7 Cal.App.4th 618, 623.)

further encumbrances was also not a fact that the Bank had sole knowledge of since that information was accessible to Igbene before he signed the deed of trust.

Since Igbene's fourth cause of action for declaratory relief was based on the same allegations found insufficient to support his first through third causes of action, the trial court dismissed it on the grounds this cause of action could not support a declaration in his favor.

II. DISCUSSION

Igbene contends the trial court erred in sustaining the Bank's demurrer to the SAC and, in the alternative, the court abused its discretion by denying him leave to amend.

A. *Standard of Review*

In reviewing a dismissal following the sustaining of a demurrer without leave to amend, the appellate court applies two separate standards of review. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) First, the complaint is reviewed de novo to determine whether it contains sufficient facts to state a cause of action. (*Ibid.*) For this purpose, we accept as true the properly pleaded material factual allegations of the complaint, along with any other facts subject to judicial notice. (*Ibid.*) The court does not, however, assume the truth of contentions, deductions or conclusions of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The judgment must be affirmed if any one of the grounds stated in the demurrer is well taken, regardless of the grounds cited by the trial court in reaching its decision. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Williams v. Pacific Mutual Life Ins. Co.* (1986) 186 Cal.App.3d 941, 951.) However, if facts were alleged showing entitlement to relief under any possible legal theory, the judgment of dismissal must be reversed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Second, where the demurrer is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so. (*Hernandez v. City of Pomona, supra*, 49 Cal.App.4th at p. 1497.) If there is a reasonable possibility that the defect can be cured by amendment, the trial court will have abused its discretion in

denying leave to amend. (*Id.* at p. 1498.) Appellant bears the burden of proving such a reasonable possibility exists. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

B. *Analysis*

1. *Breach of Contract*

As a threshold matter, the Bank contends that no breach of contract action may be predicated on the loan commitment letter because the terms stated in the letter were too indefinite to constitute a contract binding on the Bank. We are not persuaded.

The law applicable to the enforceability of loan commitments has been stated as follows: "Letters of commitment, for which a fee is paid, constitute an option to the applicant to obtain the loan at the specified terms. [Citations.] Under the usual principles of lender liability, '[*a*] *loan commitment is not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied*. When the commitment does not contain all of the essential terms . . . the prospective borrower cannot rely reasonably on the commitment, and the lender is not liable for either a breach of the contract or promissory estoppel.' (9 Miller & Starr, [Cal. Real Estate (2d ed. 1989)] § 28.4, at p. 8, fn. omitted.) The material terms of a loan include the identity of the lender and borrower, the amount of the loan, and the terms for repayment. [Citations.]" (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 115, italics added.)[4]

Here, the loan commitment letter identified the lender and borrower, and specified, among other things, the maximum principal amount to be loaned, the maximum loan-to-value percentage, the term of the loan, the floor, ceiling and method of calculating the loan's variable interest rate, the property and method to be used to secure the loan, the

[4] The text quoted from the 1989 edition of Miller and Starr appears in section 36:4 of the current edition. (See 12 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 36:4, p. 9.) The third edition of the treatise also states: "Whether or not a commitment fee is paid, a written loan commitment by a lender which contains the essential terms [identity of lender and borrower, amount of loan, terms of repayment] is a binding and enforceable obligation *of the lender*, subject to the conditions precedent expressed in the commitment." (*Id.* at pp. 10–11, italics added.)

loan fees to be charged when the loan was funded, prepayment penalties applicable to the loan, and the terms for repaying the loan in installments. We find this case completely distinguishable from the case relied upon by the Bank, *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885. The loan commitment found to be unenforceable in *Laks* left critical terms for future agreement. It failed to specify the amount of the loan to be made or how that amount would be determined, the security for the loan, or the identity of the borrower, and it made the lender's commitment conditional on whether other lenders, with whom the borrower was still negotiating, also committed themselves to provide loans for the project. (*Id.* at p. 890.) Those are not the facts here.

In our view, the Bank's loan commitment letter in this case contained sufficient terms to constitute an enforceable option contract, that is, an enforceable agreement *by the Bank* to offer Igbene a loan subject to the conditions set out in the letter and to keep the conditional offer open until the expiration date of September 24, 2004. The dispositive issue for this court is whether we can say as a matter of law at this stage of the litigation that the Bank fulfilled its promise to furnish Igbene a loan on terms consistent with those promised in the letter. Based on the conditional language of the letter, we find there was no breach of the Bank's loan commitment as a matter of law.

Igbene alleges the Bank breached its loan commitment by providing in the deed of trust and promissory note that (1) the borrower would be in default if he encumbered the Washington Street property with any lien other than the deed of trust; (2) the Bank would hold a security interest in Igbene's personal property attached to the Washington Street property; and (3) in the event of a default, the Bank could increase the interest rate on the loan above the ceiling of 11 percent provided in the commitment letter. But Igbene's allegations ignore the fact that the letter contained broad language conditioning the Bank's obligation to make the loan on Igbene's execution of any "documentation deemed necessary" by the Bank or its counsel, including, specifically, documentation of the Bank's collateral security interest "in a form and content . . . satisfactory" to the Bank. In our view, these conditions are broad enough to encompass all of the provisions of which Igbene now complains. That does not mean the Bank had a free hand to impose any

conditions it saw fit on Igbene. The Bank's loan commitment created an *option* contract binding only on the Bank. It did not require Igbene to go forward with the loan. If Igbene believed the Bank's documentation was too onerous, or that he could have obtained a loan on comparable economic terms minus the objectionable terms from another lender, he was free to negotiate with the Bank for better terms or, failing that, to refuse the Bank's loan offer. By the terms of the commitment letter, however, once Igbene signed the documentation presented to him by the Bank he indicated his unconditional approval of the terms contained therein.

In these circumstances, we find as a matter of law that the SAC fails to plead facts showing that Igbene is entitled to relief for breach of contract.

2. *Fraud*

Igbene's second cause of action for deceit fails on similar grounds. Igbene alleges the Bank represented in the letter that it would issue him a loan on the conditions spelled out in the letter, but failed to disclose that it would curtail his right to further encumber the property in the deed of trust to be executed by him before the funding was provided. According to Igbene, this states a claim under Civil Code section 1710, subdivision (3).[5] As the trial court correctly found, however, the letter made Igbene's execution of all legal documents, including a promissory note and deed of trust *in a form and content satisfactory to the Bank*, an express condition for the making of the loan. By signing the deed of trust, Igbene accepted the no-further-encumbrance term.

On appeal, Igbene asserts that his execution of the deed of trust is irrelevant because the Bank fraudulently induced him to sign *the commitment letter* by failing to disclose to him that his right to further encumber the Washington Street property was going to be curtailed by the deed of trust. He points to the allegation of the SAC that had he known the true facts, he would not have executed the commitment letter, especially in view of the amount of equity he had in the property. But signing the commitment letter

[5] Civil Code section 1710, subdivision (3) provides that actionable deceit includes "[t]he suppression of a fact[] by one . . . who gives information of other facts which are likely to mislead for want of communication of that fact."

did not obligate Igbene to accept a loan restricting his right to encumber the property. The letter bound the Bank to keep its conditional offer of a loan open for a specified period of time; it did not bind Igbene to accept the offer if the documentation required by the Bank contained unacceptable provisions. As a matter of law, Igbene's allegations do not show the Bank defrauded him by failing to specifically disclose before he executed the commitment letter that it would limit his ability to further encumber the Washington Street property as a condition of the loan.[6]

Igbene alleged in his third cause of action that the Bank had a duty to disclose its intent to restrict his right to further encumber the property because the Bank had exclusive knowledge of this fact and knew that it was not reasonably discoverable by Igbene. (See *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [in transactions not involving fiduciary or confidential relations, a cause of action for nondisclosure of material facts may arise when the facts are known only to the defendant, and the defendant knows they are not known to or reasonably discoverable by the plaintiff].) This cause of action was also properly dismissed. The commitment letter put

---

[6] Clauses limiting additional encumbrances are common in commercial real estate lending. (See *Women's Federal Savings and Loan Ass'n v. Nevada National Bank* (9th Cir. 1987) 811 F.2d 1255, 1257 [such clauses are "standard" in commercial trust deeds].) The purpose of no-encumbrance clauses is explained as follows in a well-known California practice guide: "Beneficiaries often prohibit additional liens on the real property even though the liens may be junior to the lien of the beneficiary. The rationale for this prohibition is that excessive debt on the property can affect the trustor's ability to continue to service the senior deed of trust. In addition, the beneficiary's remedies for an event of default can be materially complicated by the rules requiring statutory notices to junior lienholders. Finally, the beneficiary frequently relies on the trustor's equity in the property to instill in the trustor care and concern for the upkeep of the property. If the trustor is allowed to remove all or a substantial part of its equity in the property by junior financing, the trustor may lose all incentives to maintain the property and perform on the senior loan. [Citations.]" (3 Miller & Starr, Cal. Real Estate Forms (2d ed. 2006) Drafting Com., Section 16, foll. § 3:21, p. 388; see also Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2009) Form 6:A, ¶ 8.13, p. 6-141 [construction loan agreement] & Form 6:I, ¶ 2.12, p. 6-203 [complex deed of trust].)

Igbene on notice that the Bank would expect him to execute a promissory note and deed of trust in a form and content satisfactory to it. If Igbene was concerned about the form or content of the documents he would be asked to sign, it was up to him to seek further information about them. It would make no sense to impose a sua sponte duty of disclosure on the Bank when it issued the letter. The commitment letter disclosed the key economic terms that would be of concern to most borrowers—the amount of the commitment, how the variable interest rate would be set, and the terms of repayment. The Bank was in no position to determine what other terms or conditions might be important to Igbene, and would not necessarily know at the commitment stage the exact form or content of the documents it would require to close the loan. Since Igbene was under no compulsion to accept the loan until after he had reviewed and signed the note and deed of trust, the Bank was under no sua sponte duty to disclose their detailed terms to him at the time they issued the commitment letter.

The trial court properly dismissed Igbene's second and third causes of action for fraud.

3. *Declaratory Relief*

In his fourth cause of action, Igbene sought a declaration that he was not in breach of the obligations secured by the deed of trust, as alleged in the Bank's notice of default, because the restriction on encumbrances was at variance with the loan commitment letter. In our view, the fourth cause of action merely restates and is wholly derivative of Igbene's first cause of action for breach of contract. Since Igbene's breach of contract claim fails as a matter of law, his declaratory relief claim was also properly dismissed. (See *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800 (*Ball*).)[7] In any event, a court has considerable discretion under Code of Civil Procedure section 1061 to deny judicial relief if it finds that a judicial declaration or determination

[7] *Ball* involved a declaratory relief claim that was wholly derivative of a dismissed statutory claim, but we see no reason to limit it to that context.

is not necessary or proper under all of the circumstances.[8] Section 1061 "vests a high degree of discretion in the trial court. Its determination to refuse to grant declaratory relief will not be disturbed on appeal unless a clear abuse of discretion is shown. The discretionary power of the trial court to deny declaratory relief may be invoked by general demurrer." (*Farmers Ins. Exchange v. Adams* (1985) 170 Cal.App.3d 712, 723, overruled on other grounds in *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 399, fn. 1; see also *Otay Land Co. v Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562–563.) Allowing Igbene to further litigate the declaratory relief cause of action in light of the trial court's other rulings on the demurrer, which we are affirming on this appeal, would be an entirely futile exercise. To the extent the trial court exercised its discretion under section 1061 in dismissing the fourth cause of action, we find no abuse of discretion. If it acted on some other basis, we would reach the same result by applying our own discretion under that statute. We will therefore affirm the dismissal of Igbene's declaratory relief claim.

4. *Denial of Leave to Amend*

Igbene contends the trial court abused its discretion by denying him leave to file a third amended complaint in which he would have added allegations that (1) he signed the Bank's commitment letter on September 2, 2004; and (2) the Bank deliberately kept him from reviewing the deed of trust and promissory note "until just prior to the close of escrow," leaving him with "little or no time to review said documents before executing same."

Whether Igbene signed the commitment letter or not is immaterial. As discussed earlier, the letter constituted an enforceable promise *by the Bank* to keep its offer of a loan open for a specified period. Igbene did not bind himself to accept the loan by signing it. The trial court stated during the hearing on the demurrer that its demurrer ruling did

[8] Code of Civil Procedure section 1061 states: "The court may refuse to exercise the power granted by [the chapter authorizing declaratory relief] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

not depend in any way on whether or not Igbene signed the letter. We concur. Igbene's proposed new allegation on that point would not overcome the defects in his pleading.

Igbene's belated claim that the Bank denied him an opportunity to review the deed of trust or promissory note is contradicted by a copy of the executed deed of trust of which this court has taken judicial notice. The deed shows on its face that Igbene signed it on October 19, 2004, which was six days after he states it was presented to him. The court need not allow leave to file a pleading not made in good faith. (See *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, 162; *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390–1391.) Igbene also makes no attempt to explain why, if the Bank *did* deny him a reasonable opportunity to review the operative documents, he did not allege that fact in the first three versions of his pleadings. (See *Abari v. State Farm Fire & Casualty Co.* (1988) 205 Cal.App.3d 530, 535.) We find no abuse of discretion in the trial court's denial of leave to amend.

III. DISPOSITION

The judgment is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Dondero, J.